

98-146

Policy Approaches to ROW Management

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I. Section 253 (c)

A. Congress included savings language:

- i. preserves governments' rights to manage ROW in reasonable and nondiscriminatory manner
- ii. intended to remove all barriers to the provision of telecommunications services by preempting state and local regulations that directly or indirectly prohibit market entry
- iii. proscribes the role to be played by local government and the scope of that authority, leaving municipalities with a very limited role in the regulation of telecommunications. *AT&T Communications v. City of Dallas*, 8 F. Supp. 2d 582, 591 (N.D. Tex. 1998).

B. Described by local governments as a safe harbor

II. General Scope of Rights-of-way Management in Brief

A. Time, Place and Manner Regulation of Facilities in ROW

AT&T Communications of the Southwest, Inc. v. City of Austin, 975 F. Supp. 928, 942-3 (W.D. Tex. 1997)

B. Limited to matters directly related to physical access and construction activities

See Qwest v. City of Auburn, 260 F.3d 1160, 2001 WL 823718, *16-18

"It is not enough to argue, as the Counterclaim Cities do, that the ordinances regulate aspects of telecommunications companies that are related to their fitness to provide services, and therefore use the rights-of-way. . . . This is simply too tenuous a connection to the "manage[ment] of rights of way." Under this semantic two-step, §253(c) would have no limiting principle. The safe harbor provisions would swallow whole the broad congressional preemption. Municipalities could regulate nearly any aspect of the telecommunications business. Indeed, these regulations come perilously close to this reductio ad absurdum" *Id.* at * 18.

C. Congress envisioned and FCC interpreted authority as restricted to:

- i. preservation of the physical integrity of streets,
- ii. orderly control of traffic,
- iii. coordination of construction schedules,
- iv. insurance, bonding, and indemnity requirements,

- v. enforcement of building codes,
- vi. tracking systems to prevent interference,
- vii. time or location of excavations to preserve traffic flow,
- viii. undergrounding facilities where consistent with other utilities
- ix. fees to recover an appropriate share of increased street repair costs, and
- x. enforcement of zoning regulations.

City of Auburn, 260 F.3d 1160, 2001 WL 823718. *16-17, *citing In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396 (F.C.C. 1997), ¶103 (subitems (i) through (vi)); *In re Classic Telephone, Inc.*, 11 F.C.C.R. 13082, 1996 Westlaw 554531 (F.C.C. 1996)(sub-items (vii) through (x)); *see, Qwest Communications v. City of Berkeley*, 146 F. Supp. 2d 1081, 1098-1099 (N.D. Cal. May 23, 2001); *see also*, TCG v. *White Plains*, 125 F. Supp. 2d at 90 (S.D.N.Y. 2000). *aff'd in part, rev'd in part*, 2002 U.S. App. LEXIS 18739 (2d Cir. N.Y. Sept. 12, 2002), *PECO Energy v. Township of Haverford*, 1999 WL 1240941 at *6 (E.D. Pa. 1999)

III. General Span of Authority in Brief

A. Competitively neutral and nondiscriminatory

- B. Preserves existing authority delegated to local government under the laws of the state and authority may be limited by more restrictive state law requirements. “[n]othing in this section affects the authority of a State or local government to”

See, AT&T Communications of the Southwest, Inc. v. City of Dallas, 8 F. Supp. 2d 582, 591, 593 (N.D. Tex. 1998); *Chattanooga v. BellSouth Telecommunications, Inc.*, 1997 US Dist. Lexis 17458 at *16 (October 24, 1997). *vacated on other grounds*, 1 F. Supp. 2d 809 (E.D. Tenn. 1998) (“Nothing in Telecom Act grants states and municipalities any rights or powers over ROW or providers beyond those which they already possess under state law.”)

IV. Local Rights-of-way Management Provisions

A. Permitted Regulations to Manage ROW

- i. Coordination of construction schedules.
BellSouth Telecommunications, Inc. v. Town of Palm Beach, 1999 U.S. Dist. LEXIS 16904 (S.D. Fla. 1999), *aff'd in part, rev'd in part*, 2001 U.S. App. LEXIS 10837 (11th Cir. May 25, 2001); **Coral Springs**, 42 F. Supp. 2d at 1309; **TCI Cablevision**, 12 F.C.C.R. at 21396; **Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems**, Third Report and Order and Second Report on Reconsideration, 11 F.C.C.R. 20227 (1996).
- ii. Insurance, bonding and indemnity requirements.
White Plains, 125 F. Supp. 2d at 91, *aff'd in part, rev'd in part*, 2002 U.S. App. LEXIS 18739 (2d Cir. N.Y. Sept. 12, 2002); **Town**

of Palm Beach, **1999 U.S. Dist. LEXIS 16904** at '6-7 aff'd in part, rev'd in part sub nom., BellSouth Telecommunications, Inc. v. Town of Palm Beach, **2001 U.S. App. LEXIS 10837** (11th Cir. May 25, 2001); TCI Cablevision, **12 F.C.C.R. at 21396**; Open Video Systems, **11 F.C.C.R. at 20227**.

- iii. The tracking of multiple systems that use the rights-of-way, to prevent interference among them.
TCI Cablevision, **12 F.C.C.R. at 21396**
- iv. General time, place and manner of construction regulations.
White Plains, **125 F. Supp. 2d at 90** (relying on the FCC's limitations on local management of rights-of-way), aff'd **2002 U.S. App. LEXIS 18739** (2d Cir. N.Y. Sept. 12, 2002); Dallas, **8 F. Supp. 2d at 591-92** (described as reasonable right-of-way regulation); City of Denver v. Qwest **Corp.**, **2001 Colo. LEXIS 135** (Colo. Feb. 26, 2001) (upheld under state law similar to Section 253); New Jersey Payphone, **2001 U.S. Dist. LEXIS 2478** at *18 (general location requirements); **PECO** Energy Co, **1999 U.S. Dist. LEXIS 19409** at *19-20 (included noise regulations).
- v. Permit fees and fees directly related to the municipality's costs incurred as a result of the telecommunications provider's ROW use.
Auburn, **260 F.3d at 1176**; BellSouth Telecommunications, **Inc.** v. City of Mobile, **2001 U.S. Dist. LEXIS 4244** *25 (S.D. Ala. Mar. 30, 2001); Dallas, **8 F. Supp. 2d at 592-93**; Open Video Systems, **11 F.C.C.R. at 20227**.
- vi. Issuance of permits prior to excavations or construction work.
City of Mobile, **2001 U.S. Dist. LEXIS 4244** at '25.
- vii. Vehicular and pedestrian traffic regulations.
New Jersey Payphone, **2001 U.S. Dist. LEXIS 2487** at '18; TCI Cablevision, **12 F.C.C.R. at 21396**
- viii. Zoning regulations.
Open Video Systems, **11 F.C.C.R. at 20227**.
- ix. Requirements to place facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies.
Auburn, **260 F.3d at 1177**. This is an area of some dispute. The extent of municipal authority to require undergrounding is placed at issue in Section 253 petitions by City Signal Communications that are presently pending before the FCC. *In* the Matter of Request by City Signal Communications, Inc., CS Docket Nos. **00-253, 00254**,

00255. Additionally, some state regulatory commissions have exclusive jurisdiction over undergrounding. See F.A.C. 25-4.088.

- x. Requirements to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation.
Auburn, 260 F.3d at 1177 (quoting legislative history).
- xi. Applicant contact information
White Plains, 125 F. Supp. 2d at 90-92, *aff'd in part, rev'd in part*, 2002 U.S. App. LEXIS 18739 (2d Cir. N.Y. Sept. 12, 2002)
- xii. Description of the proposed franchise area
White Plains, 125 F. Supp. 2d at 90-2 *aff'd in part, rev'd in part*, 2002 U.S. App. LEXIS 18739 (2d Cir. N.Y. Sept. 12, 2002)
- xiii. Proposed construction schedule and construction map
White Plains, 125 F. Supp. 2d at 91, *aff'd in part, rev'd in part*, 2002 U.S. App. LEXIS 18739 (2d Cir. N.Y. Sept. 12, 2002)

B. Prohibited Regulations That Exceed Authority to Manage ROW

- i. Onerous application and permit processes
Auburn, 260 F.3d 1160, 2001 WL 823718 *17 (9th Cir. April 24, 2001); *Board of County Com'rs of Grant County, New Mexico v. Qwest*, 169 F. Supp. 2d 1243, 2001 WL 1326979, *3 (D.N.M. August 3, 2001); *Qwest Communications v. City of Berkeley*, 146 F. Supp. 2d 1081, 1098-1100 (N.D. Cal. May 23, 2001)(application and permitting required the submission of the identity and legal status of carrier, a map and description of existing and proposed encroachments, a description of the services, 3 year business plan, technical qualification, information to establish applicant has all governmental approvals, convictions and violations of law, and all information deemed necessary by city); *TCG N.Y., Inc. v. City of White Plains*, 125 F. Supp. 2d 81, 91 (S.D.N.Y. 20001, *aff'd in part, rev'd in part*, 2002 U.S. App. LEXIS 18739 (2d Cir. N.Y. Sept. 12, 2002); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F.Supp.2d 582, 587-8, 593 (N.D.Tex. 19981, *vacated as moot due to subsequent stature*, 2001 U.S. App. LEXIS 3890 (5th Cir. Mar. 15, 2001); *Bell Atlantic v. Prince George's County, Md.* 49 F.Supp.2d at 808-11, 814, *vacated and remanded on other grnds*, 212 F.3d 863 (4th Cir. 2000)
- ii. Requirement to describe services
City of Auburn, 260 F.3d 1160, 2001 WL 823718, *17 (9th Cir. April 24, 2001); *Qwest Communications v. City of Berkeley*, 146 F. Supp. 2d 1081, 1098-1099 (N.D. Cal. May 23, 2001); *TCG New York, Inc. v. City of White Plains*, 125 F. Supp. 2d 81, 91 (S.D.N.Y. 20001 *aff'd in part, rev'd in part* 2002 U.S. App. LEXIS 18739(2d Cir. N. Y. Sept. 12, 2002).

- iii. Proof of financial, technical and legal qualifications
City of Auburn, 260 F.3d 1160, 2001 WL 823718, *17 (9th Cir. April 24, 2001); *Qwest Communications v. City of Berkeley*, 146 F. Supp. 2d 1081, 1098-1099 (N.D. Cal. May 23, 2001); *New Jersey Payphone Assn. V. Town of West New York*, 130 F. Supp. 2d 631, 2001 WL 242154 at *9 (D.N.J. March 7, 2001) (experience of the payphone provider a barrier to entry), *aff'd* 299 F3d 235 (2d Cir July 26, 2002); *TCG New York, Inc. v. City of White Plains*, 125 F. Supp. 2d 81, 91 (S.D.N.Y. 2000) *aff'd in part, rev'd in part*, 2002 U.S. App. LEXIS 18739 (2d Cir. N.Y. Sept. 12, 2002); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998).

- iv. Franchising provisions which the local government deems necessary in the public interest
Auburn, 260 F.3d at 1178; *TCG New York, Inc. v. City of White Plains, New York*, 125 F. Supp. 2d 81, 92-3 (S.D.N.Y. 2000), *aff'd in part, rev'd in part*, 2002 U.S. App. LEXIS 18739 (2d Cir. N.Y. Sept. 12, 2002) (striking city's discretion to approve franchise only if city found to be in public interest); *Qwest v. Berkeley*, 146 F. Supp. 2d 1081 (N.D. Cal. 2001) (prohibiting the consideration of "such other factors" and information as city wished).

- v. Unfettered discretion to approve or deny a franchise
City of Auburn, 260 F.3d 1160, 1176, 2001 WL 823718, *18 (9th Cir. April 24, 2001) (described by the court as the "the ultimate cudgel"); *Board of County Com'rs of Grant County, New Mexico v. Qwest*, 169 F. Supp. 2d 1243, 2001 WL 1326979, *3 (D.N.M. August 3, 2001); *Qwest Communications v. City of Berkeley*, 146 F. Supp. 2d 1081, 1098-1099 (N.D. Cal. May 23, 2001); *New Jersey Payphone Assn. V. Town of West New York*, 130 F. Supp. 2d 631, 2001 WL 242154 at *9-10 (D.N.J. March 7, 2001) (exclusive franchise is incompatible with §2531 *aff'd* 299 F3d 235 (2d Cir. July 26, 2002); power to deny permission to use right-of-way must be tied to right-of-way management concerns and not left to the unguided discretion of Town officials; prohibiting unfettered discretion of the town to change the rules granting access to the rights-of-way), *aff'd* 299 F3d 235 (3d Cir. 2002); *TCG New York, Inc. v. City of White Plains, New York*, 125 F. Supp. 2d 81, 92 (S.D.N.Y. 2000) *aff'd in part, rev'd in part*, 2002 U.S. App. LEXIS 18739 (2d Cir. N.Y. Sept. 12, 2002); *Peco Energy Co. v. Township of Haverford*, 1999 WL 1240941, *6 (E.D. Penn. 1999); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 592-3 (N.D. Tex. 1998); *Prince George's County*, 49 F. Supp. 2d at 808-11, 814, *vacated and remanded on other grnds*, 212 F.3d 863 (4th Cir. 2000); *BellSouth Telecommunications, Inc. v. City of Coral Springs*, 42 F. Supp. 2d 1304, 1310 (S.D. Fla. 1999), *aff'd in part, rev'd in part sub nom.*, *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 2001 U.S. App. LEXIS 10837 (11th Cir. May 25, 2001)

- vi. **Inspection of records and reporting requirements beyond that needed to enforce valid right-of-way regulations**
Auburn, 260 F.3d 1160,1178, 2001 WL 823718, *17 (9th Cir. April 24, 2001); Board of County Com'rs of Grant County, New Mexico v. Qwest, 169 F. Supp. 2d 1243, 2001 WL 1326979, *3 (D.N.M. August 3, 2001; Qwest Communications v. City of Berkeley, 146 F. Supp. 2d 1081, 1098-1099 (N.D. Cal. May 23, 2001) (prohibiting a requirement that the company report any person who has leased capacity on the company's network and other general reporting requirements); TCG New York, Inc. v. City of White Plains, 125 F. Supp. 2d 81, 92, 94 (S.D.N.Y. 2000) aff'd 2002 U.S. App. LEXIS 18739 12d Cir. N.Y. Sept. 12, 2002) (City's limited authority does not give it the power to micromanage TCG's business records, unless they are directly related to the rights-of-way or a proper fee, thus striking down requirements for maintenance of books concerning TCG's operations, audit rights of financial records, and other information at City's request; Board of County Com'rs of Grant County, New Mexico v. Qwest. 169 F. Supp. 2d 1243, 2001 WL 1326979, *3 (D.N.M. August 3, 2001; Dallas, 8 F.Supp.2d at 588 (requesting detailed audits of AT&T's financial and other records and notice to the City of all communications with FCC, SEC and PUC regarding service in city); BellSouth Telecommunications, Inc. v. City of Coral Springs, 42 F. Supp. 2d 1304, 1308-9 (S.D. Fla. 1999) (striking requirements for information regarding systems, plans, or purposes of telecommunications facilities), aff'd in par?, rev'd in part sub nom., BellSouth Telecommunications, Inc. v. Town of Palm Beach, 2001 U.S. App. LEXIS 10837 (11th Cir. May 25, 2001); Prince George's County, 49 F. Supp. 2d at 808-11, 814 vacated and remanded on other grounds, 212 F.3d 863 (4th Cir. 2000)
- vii. **Requirement to waive legal challenges**
TCG New York, Inc. v. City of White Plains, 125 F. Supp. 2d 81, 94 (S.D.N.Y. 2000) aff'd in part, rev'd in part, 2002 U.S. App. LEXIS 18739 (2d Cir. N.Y. Sept. 12, 2002)
- viii. **Names and addresses of all persons with whom the carrier has an agreement for use of its facilities**
Qwest v. Berkeley, 146 F.Supp.2d 1081, 1098-9 (N.D. Cal. May 23, 2001)
- ix. **Most favored nations provisions for most favorable rates and terms**
TCG New York, Inc. v. City of White Plains, 125 F. Supp. 2d 81, 94 (S.D.N.Y. 2000) aff'd 2002 U.S. App. LEXIS 18739 (2d Cir. N.Y. Sept. 12, 2002); Auburn, 260 F.3d 1160, 1178-9, 2001 WL 823718 *18 (9th Cir. April 24, 2001); In re: TCI Cablevision. 12 F.C.C.R. 21396, 21441 ¶105 (1997)
- x. **Requirements to provide the locality with free fiber and conduit capacity**

Auburn, 260 F.3d at 1179; Dallas, 8 F. Supp. 2d at 593; but see *TCG Derroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000)(finding that installed conduit could be received in lieu of a right-of-way fee).

xi. Service regulations

See Auburn, 260 F.3d at 1179; Prince George's County, 49 F. Supp. 2d at 817; Coral Springs, 42 F. Supp. 2d at 1310; Dallas, 8 F. Supp. 2d at 593; *PECO v. Energy Co. v. Haverford*, 1999 U.S. Dist. LEXIS 19409 at *20-23. (E.D. Pa. December 20, 1999)

xii. Equal Employment Opportunity Provisions

Austin, 975 F.Supp. 928, 938; 1997 US Dist. Lexis 12973 (W.D.Tex. August 21, 1997), *vacated as moot*, 2000 U.S. App. LEXIS 33524(intervening statute preempted subject ordinance)

V. Industry Rights-of-way Working Group's ("IROW")

Recommended Measures to Promote Public Rights-of-way Access

- A. Access to public rights-of-way should be extended to all entities providing intrastate, interstate or international telecommunications or telecommunications services or deploying facilities to be used directly or indirectly in the provision of such services ("Providers").
- B. Government entities should act on a request for public rights-of-way access within a reasonable and fixed period of time from the date that the request for such access is submitted, or such request should be deemed approved.
- C. Fees charged for public rights-of-way access should reflect only the actual and direct costs incurred in managing the public rights-of-way and the amount of public rights-of-way actually used by the Provider. In-kind contributions for access to public rights-of-way should not be allowed.
- D. Consistent with the measures described herein and competitive neutrality, all Providers should be treated uniformly with respect to terms and conditions of access to public rights-of-way, including with respect to the application of cost-based fees.
- E. Entities that do not have physical facilities in, require access to, or actually use the public rights-of-way, such as resellers and lessees of network elements from facilities-based Providers, should not be subject to public rights-of-way management practices or fees.
- F. Rights-of-way authorizations containing terms, qualification procedures, or other requirements unrelated to the actual management of the public rights-of-way are inappropriate.

- G. Industry-based criteria should be used to guide the development of any engineering standards involving the placement of Provider facilities and equipment.
- H. Waivers of the right to challenge the lawfulness of particular governmental requirements as a condition of receiving public rights-of-way access should be invalid. Providers should have the right to bring existing agreements, franchises, and permits into compliance with the law.
- I. Providers should have a private right of action to challenge public rights-of-way management practices and fees, even to the extent such practices and fees do not rise to the level of prohibiting the Provider from providing service.
- J. The Commission should vigorously enforce existing law and use expedited procedures for resolving preemption petitions involving access to public rights-of-way.

VI. Recommended FCC Action

- A. Promulgate Rules delineating federal, state and local regulation of public rights-of-way while recognizing local governments' police powers;
- B. Adopt Expedited Enforcement Mechanism to Adjudicate public rights-of-way disputes;
- C. Employ Enforcement Mechanism to incent localities to negotiate fees and regulations in good faith.
- D. Adopt Uniform Standards or Model Regulations for access to public rights-of-way.

VII. Moving Beyond Roadblocks—FL Communications Services Tax Simplification Law

- A. Working Coalition of Key Stakeholders—Public and Private
 - i. Governor created Telecommunications Taxation Task Force which collaborated with and approved recommendations of Tax Work Group (representing interests of 34 private sector corporations) and presented them to Governor and Legislature.

- ii. Collaboration continued: Florida League of Cities, Florida Association of Counties, Florida Cable Television Association, and Florida Telecommunications Industry Association

B. Created Atmosphere of Trust and Compromise

C. Mobilized Strong Leadership from Key State Policymakers

D. Accomplished Goals

- i. Fair and Equitable Tax

- a. Economically Efficient: Replaces states sales and use tax, state gross receipts tax, local public service tax, local option sales tax, and local franchise fees with (one state and one local) simplified "flat tax," broadened to include essentially all communications services.
- b. Simplicity of Administration: Centralized Admin and Auditing
- c. Revenue Stability: Revenue Neutral
- d. Competitiveness: Competitively Neutral

- ii. Rights-of-way Regulation

- a. Prohibits franchise, license or other agreement as condition to use ROW
- b. Provides registration process
- c. Prohibits use of authority over ROW to assert regulatory control over providers
- d. ROW regulations must be reasonable, nondiscriminatory and include only those matters necessary to manage ROW

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